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House of Representatives

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January 9, 2004

The Honorable Ann Veneman
U.S. Department of Agriculture
Jamie L. Whitten Federal Building #200A
14th Street & Independence Avenue, S.W.
Washington, DC 20250

Dear Secretary Veneman:

We are writing to comment on the U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service's (AMS's) Notice of Proposed Rulemaking (NPRM), published on October 30, 2003, and entitled, "Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule" (68 FR 61944, **Docket No. LS-03-04**). Our comments fall into five main categories: (1) questions regarding how the proposed rule relates to the intent of the Country of Origin Labeling (COOL) section of the Farm Security and Rural Investment Act of 2002 (Section 10816 of Public Law 107-171); (2) questions regarding regulatory benefits and costs; (3) questions regarding AMS's failure to consider less costly alternatives; (4) questions regarding AMS's regulatory flexibility analysis; and (5) other recommendations.

I. Questions Regarding How the Proposed Rule Relates to Congressional Intent

As acknowledged by USDA, the intent of Section 10816 of Public Law 107-171 is to "provide consumers with additional information on which to base their purchasing decisions. It is not a food safety or animal health measure" (68 FR 61945).[1] In enacting this legislation, Congress sought to increase consumer demand for American agricultural commodities. In the first hearing on COOL, held by the House Agriculture Committee Subcommittee on Livestock and Horticulture on April 28, 1999, then full Committee Chairman Larry Combest, explained the connection between consumer information and increased agricultural profit margins. He stated, "[t]his is the intent of all country-of-origin labeling proposals – selling more farmers' and ranchers' products. By associating these products with the positive feeling consumers have with

[1] Other Congressional initiatives address food safety, such as to protect the American public from mad cow disease. In addition, USDA's Food Safety and Inspection Service and the Department of Health and Human Services' Food and Drug Administration are specifically charged with ensuring food safety.

their country, State, or region, we hope consumers choose on behalf of our constituents" (Serial No. 106-15, p. 4). In essence, by enacting COOL, Congress said that American consumers have the right-to-know where their food comes from. Congress believed that, if American consumers were presented with this information, they would generally choose to buy American products, thereby increasing the profitability of the U.S. agricultural sector.

Although AMS's NPRM follows the letter of the law, it runs counter to the spirit of the law. The main reason for this problem is the exorbitant estimated implementation costs. AMS estimates implementation costs between $582 million to $3.9 billion in the first year, and then between $138 million to $596 million annually after a 10-year adjustment period (68 FR 61956 – 57). Given the enormity of these figures, it is unlikely that U.S. farmers and ranchers will be able to pass all of the increased costs onto consumers. This means that U.S. farmers and ranchers will be required to absorb the majority of the costs, thus decreasing their competitiveness, and marginalizing any profits attributed to increased demand for U.S. agricultural commodities. The proposed rule is entirely inconsistent with the Congressional intent to increase the prosperity of the U.S. agricultural sector since it effectively decreases U.S. competitiveness and provides little, if any, of the intended benefits of the authorizing legislation (see more on expected benefits below).

Moreover, since it will take ten years for the annual implementation costs to substantially decline, many small U.S. producers, which generally have very tight profit margins, may incur substantial losses, and be forced to go out of business before implementation costs stabilize. Given the importance of small businesses to the U.S. economy, this result is entirely inconsistent with Congressional intent.

II. Questions Regarding Regulatory Benefits and Costs

AMS's benefit-cost analysis incompletely estimates the benefits and costs of its NPRM. First, the benefits are not quantified. Instead, AMS simply states that the benefits will be "small and will accrue mainly to those consumers who desire country of origin information" (68 FR 61955). Moreover, AMS's benefit analysis focuses on the failure of willingness-to-pay studies to adequately determine benefits. However, AMS does not discuss or consider similar voluntary State labeling programs, such as the "Buy California" program or the "Go Texan" program, both of which encourage consumers to buy their State's agricultural products and have been beneficial to the respective State industries.

AMS's cost analysis is also inadequate, especially due to the broad range of estimated costs – from $582 million to $3.9 billion. Little can be deduced about the NPRM's economic implications for the agricultural sector with such a wide range. Similarly, AMS's cost analysis is incomplete because it fails to explain in detail the components underlying each of its cost estimates. AMS's cost analysis should have included cost estimate subcategories for each type of covered commodity so that industry and policymakers can fully comment on AMS's estimates. For example, when analyzing the costs for retailers to implement COOL, AMS should have separated cost estimates by type of food, e.g., by beef, lamb, fish, fruit, vegetables, and nuts. Then, these categories should have been divided further into sub-categories, such as increased costs for labeling, training of labor, signage, display allocation, recordkeeping,

equipment purchase, increased storage space, and liability insurance. Without such detailed information, it is impossible to determine if AMS fully accounted for all of the new expenses that businesses will incur.

III. Questions Regarding Failure to Consider Less Costly Alternatives

AMS offers six alternative approaches to implementing COOL, but automatically discredits five of these approaches because of their conflict with the governing statutory language. According to AMS's section entitled "Alternative Approaches," the only viable alternative for decreasing regulatory burden is through the definition of the term "processed food item." This is because "[t]he scope of commodities, or number of items, covered by the proposed rule changes under alternative definitions of a processed food item" (68 FR 61955). Essentially, if fewer items are covered, lower implementation costs will be incurred. Yet, earlier in the NPRM, in the section titled, "Key Components of the Law," alternative definitions for "processed food item" are dismissed, as illustrated by the following statement:

> In defining "processed food item" in the voluntary guidelines (67 FR 63367), AMS recognized that the term "processed" has been previously defined in other regulations promulgated by AMS, such as those issued in conjunction with the National Organic Program. AMS also stated that it did not believe that these definitions were suitable for use in the COOL program because using such a broad definition would exempt commodities that Congress clearly intended to be governed under this law (68 FR 61946).

Essentially, this means AMS does not consider any of its six alternative approaches viable. More importantly, although AMS requests comments on the definition of the term "processed food item," the NPRM attempts to discredit any definition other than that of AMS. Thus, it seems that, even if logical alternatives are suggested, AMS will summarily reject them.

In the NPRM, AMS failed to consider an array of obvious alternatives. One such alternative would be to reduce the recordkeeping burden. AMS's NPRM requires that retailers maintain COOL records at the point of sale for 7 days following the retail sale of the product. This is largely unnecessary since consumers are not concerned with the country of origin of a food item that was sold a week before they entered the store. Reducing 7 days to 2 days would reduce the recordkeeping burden and the associated costs. Similarly, reducing the overall recordkeeping burden from 2 years to 1 year would also reduce the cost of the rule.

Another alternative that AMS failed to consider was using general, rather than specific, labels for products involving more than one country. Listing numerous countries on a label is not only expensive but also it serves no real purpose in the marketplace. A consumer who prefers American beef will buy the package of meat labeled "Product of U.S.A.," not the package labeled "Born in Mexico, Raised in Canada, Slaughtered in U.S.A." Thus, mixed country products should simply be labeled "mixed origin." Labeling the products in this manner would reduce the costs associated with labeling, as labels are less expensive when bought in bulk, and would reduce the complexity of implementation.

Given the NPRM's staggering implementation cost estimates, it is imperative that AMS consider alternatives that enable the law to be implemented in the most efficient and cost-effective manner. AMS contends that the law provides "little regulatory discretion for this proposed rulemaking" (68 FR 61954). We disagree. In any case, having little discretion is not the same as having no discretion, contrary to what AMS' failure to produce viable alternatives suggests. Yet, if after more intensive research and consideration this "little discretion" prevents AMS from making meaningful reductions to the implementation costs, the Administration should seek legislative relief.

IV. Questions Regarding the Regulatory Flexibility Analysis

Since this rule will likely have a significant economic impact on U.S. small business, AMS was required by law to conduct a regulatory flexibility analysis in accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). AMS's analysis is woefully inadequate, especially since its proposed alternatives will not sufficiently decrease the burden on small entities.

For example, AMS's suggestion, that "market participants other than those retailers defined by statute may decide to sell products through marketing channels not subject to the proposed rule" (68 FR 61974), is not reasonable in today's marketplace. If small growers and producers limited their sales to exempted retailers, they would lose a significant portion of their market, and perhaps, more importantly, lose a significant amount of flexibility. This decreased flexibility could potentially have serious ramifications. Since many of the covered commodities are perishable, loss of market share may mean that producers' and growers' products spoil before they can be sold to retailers. Additionally, market disruptions may occur from artificially limiting supply. For the same reasons, AMS's conclusion that "retailers may seek to limit the number of entities from which they purchase covered commodities" (68 FR 61977) is ill-conceived.

Likewise, AMS's notion that the NPRM offers regulatory flexibility to small entities because it is a performance standard, rather than a design standard, is flawed. In the absence of nonbinding "safe harbor" guidance, numerous, and possibly conflicting, procedures and policies for implementing COOL may arise. As a result, small entities may be required to comply with a variety of implementation approaches, and will consequently incur greater implementation and compliance costs.

V. Recommendations

This section presents three options for AMS's consideration. We recommend that the Administration consider Option 1 before issuing any final rule. If AMS decides to finalize its current regulatory approach, we recommend that AMS adopt Options 2 and 3.

Option 1: USDA should pursue legislative relief.

Currently, the overwhelming costs and AMS's judged "small" benefits of the proposed rule argue in favor of at least delaying the difficult and not yet fully conceptualized and costed implementation of COOL. AMS should seek legislative relief, and advocate for COOL legislation that is more flexible and feasible.

In the interim, AMS should continue to operate and improve its voluntary program. Also, the agricultural industry should actively participate in this voluntary program. COOL was developed to be a marketing tool. If consumers and the agricultural sector refuse to utilize this tool without a government mandate, then COOL cannot possibly satisfy its intended goals.

Option 2: AMS should reduce the recordkeeping requirements to limit regulatory burden.

According to AMS, firms affected by the rule will incur, at a minimum, $582 million in recordkeeping costs. This recordkeeping burden is huge and excessive and can easily be reduced. This need is especially true given the nature of the program. Consumers are concerned if the fruit or vegetable they are buying today is properly labeled. For the most part, they do not care if the orange they bought two years ago was mistakenly labeled "Product of Spain," when it was actually from California.

At the very least, we encourage AMS to adopt a 1-year recordkeeping requirement. Since the Food and Drug Administration recently proposed a 1-year recordkeeping requirement in its bio-terrorism rule, a 1-year recordkeeping requirement would reduce unnecessary burden imposed on the agricultural sector. Additionally, since many entities will be required to comply with both rules, implementation and compliance costs of the two rules will be reduced. AMS should also consider reducing the on-site recordkeeping requirement from 7 days to 2 days.

Option 3: AMS should publish nonbinding guidance for implementing COOL.

As discussed previously, in the absence of nonregulatory, nonbinding ("safe harbor") guidance, it is likely that producers will incur greater implementation and compliance costs since individual retailers will develop their own unique implementation approaches. In order to minimize the number of approaches, AMS should issue draft and, after public comments, final nonbinding guidance for implementing COOL. In doing so, AMS would not detract from the flexibility it believes is offered in the NPRM. Rather, in providing such guidance, AMS would provide small businesses, which generally have few resources, with an acceptable template for implementing COOL. Without such guidance, it is probable that small business will be unable to implement COOL in a cost-effective and efficient manner, resulting in reduced compliance or a decrease in small business competitiveness.

Thank you for thoughtfully considering our comments. If you have any questions about this letter, please contact Professional Staff Member Melanie Tory at 226-4376.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs

Tom Davis
Chairman

cc: The Honorable John Tierney

The Honorable Henry Waxman